APR 2 1990

No. 89-1379

In the Supreme Court of the United States

OCTOBER TERM, 1989

C.V. ALSTON, ET AL., PETITIONERS

v.

GENERAL MOTORS CORPORATION, RESPONDENT

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the South Carolina Uniform Commercial Code permits an action for diminished resale value of an automobile.

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BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (89-1164 Pet. App. 1a-23a) is reported at 883 F.2d 287. The opinion of the district court (89-1164 Pet. App. 24a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1989. Petitions for rehearing were denied on September 27, 1989 (89-1164 Pet. App. 43a-45a), and October 24, 1989 (*id.* at 46a-48a). On December 12, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 22, 1990, and the petition in No. 89-1164 was filed on that date. Petitioners state that their counsel received that petition on January 25, 1990. The cross-petition for a writ of

certiorari was filed on February 26, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The background of this case is discussed in the main petition. 89-1164 Pet. 2-9. The facts relevant to the cross-petition are as follows.

Cross-petitioners are 12 individuals and one corporate plaintiff who seek to recover damages from respondent General Motors Corporation (GM) for breach of the "implied warranty of merchantability" on certain diesel automobiles, even though they claim not one penny of repair costs associated with the operation of their motor vehicles. Under what the court of appeals aptly called a "novel" theory (89-1164 Pet. App. 20a), petitioners claim that the implied warranty of merchantability—a warranty that arises by operation of law in every case and in no way depends on individual circumstances—is breached when a product has a "diminished resale value," even though the product performs its intended function entirely without incident.

Although petitioners brought their novel claim in federal court under the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, it is undisputed that the scope of the implied warranty of merchantability is a question of state law. As petitioners acknowledge at the outset (Cross-Pet. 2-3), the Act defines "implied warranty" as "an implied warranty arising under State law." 15 U.S.C. 2301(7). As petitioners likewise acknowledge (Cross-Pet. 14), Section 108 of the Act, 15 U.S.C. 2308, modified those state-defined implied warranties with certain federal

standards,[1] but nothing in the federal modifications of state law bears on the question whether the implied warranty covers "diminished resale value." Accordingly, in this Court as in the courts below, petitioners' entire argument turns on a construction of the Uniform Commercial Code (UCC), a statute that has been enacted in various forms in most States but has no federal force.

The district court rejected petitioners' novel construction of the UCC. The court applied South Carolina's version of the UCC, specifically S.C. Code Ann. § 36-2-314 (1976), on the ground that most of the named plaintiffs purchased their cars in South Carolina. 89-1164 Pet. App. 28a-29a & n.4. Relying on two cases that squarely rejected claims for diminished resale value, and noting that "[n]one of the cases cited by plaintiff[s] specifically holds that a plaintiff can establish a breach of the implied warranty of merchantability by proof of a likelihood of failure of the goods to perform," the court held that petitioners failed to state a claim on which relief could be granted. *Id.* at 29a-31a. As the court observed (*id.* at 32a):

> The warranty of merchantability guarantees that the warranted goods are fit for the ordinary purposes for which they are used. Thus, in this case, GM warranted that the cars it manufactured would be fit for driving and transportation. GM did not warrant to each purchaser that every other purchaser's car would be fit. As

[1] Thus, there is no question, and plaintiffs do not dispute (in either the cross-petition or the brief in opposition to the main petition), that the issue raised in the main petition—the construction of the term "conscionable" in 15 U.S.C. 2308(b)—raises a question of federal law.

> plaintiffs themselves point out, the alleged loss in resale value results from the poor reputation of the cars not from a manifest defect in any of the cars which have experienced no mechanical problems.

The court of appeals affirmed in pertinent part. Like the district court, and without objection by petitioners, the court of appeals applied South Carolina law to this question. 89-1164 Pet. App. 9a.[2] The court of appeals also noted that petitioners cited only "singularly unhelpful" cases that did not "address the substantive question of whether the implied warranty of merchantability protects against an unanticipated diminution in secondary market values." *Id.* at 20a. At the same time, the court noted numerous cases holding that the ordinary "purpose" of automobiles protected by the implied warranty of merchantability is providing reliable transportation —a purpose undisputedly fulfilled in this case. *Id.* at 21a-22a. "[I]t is for this reason that several courts have rejected claims similar to those pressed here." *Id.* at 22a.

GM has sought this Court's review of other aspects of the Fourth Circuit's decision, on an issue of federal law that would affect literally every sale of a consumer product covered by the Magnuson-Moss Act if the decision below were permitted to stand. The present conditional cross-petition, filed on behalf of 13 of the more than 130 respondents to GM's petition, seeks review of the Fourth Circuit's construction of the South Carolina UCC.

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[2] Petitioners' statement that the court of appeals did not "explicitly look [ ] to the law of any particular state" (Cross-Pet. 15; see also *id.* at 18 n.22) is wrong.

ARGUMENT

The cross-petition should be denied. The issue it raises is one of state law and therefore wholly inappropriate for resolution by this Court. In any event, the decision below is plainly correct and consistent with all relevant precedent.

Petitioners make no claim to have presented an issue of federal law. They specifically admit that state law governs (Cross-Pet. 2-3, 14), and they ask this Court to construe the UCC (*id.* at 17-21). This Court, however, does not sit to review questions of state law. See, *e.g.*, *Volt Information Sciences, Inc.* v. *Board of Trustees*, 109 S. Ct. 1248, 1253 (1989); *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979); *Cort* v. *Ash*, 422 U.S. 66, 73 n.6 (1975).

Even if the question presented were one of federal law, there would be no reason to review the court of appeals' rejection of petitioners' claim. Petitioners' argument is that an automobile that functions exactly as intended is "unmerchantable" if it has a "diminished resale value" compared to some other benchmark. But unmerchantability is not a concept designed to protect against such future risks. Rather, "where a car can provide safe, reliable transportation it is generally considered merchantable." *Taterka* v. *Ford Motor Co.*, 86 Wis. 2d 140, 271 N.W.2d 653, 655 (1978), *quoted in* 89-1164 Pet. App. 22a. As one other decision, on which the courts below relied (*id.* at 22a, 29a), stated in squarely rejecting petitioners' theory:

> The majority of the tires sold to putative class members, by doing what they were supposed to do for as long as they were supposed to do it, clearly lived up to that "minimum level of qual-

> ity" which is all U.C.C. § 2-314(2)(c) requires. * * * Plaintiffs' bald assertion that a "common" defect which never manifests itself "*ipso facto* caused economic loss" and breach of implied warranty is simply not the law.

Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 603 (S.D.N.Y. 1982) (emphasis omitted); see also *Yost v. General Motors Corp.*, 651 F. Supp. 656, 657 (D.N.J. 1986); *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1191-1192 (N.D. Ill. 1980), rev'd in part on other grounds, 660 F.2d 311 (7th Cir. 1981), cert. denied, 456 U.S. 974 (1982).

Petitioners cite no decision of a federal court of appeals or state court of last resort that even arguably conflicts with the decision below rejecting their claims.[1] Petitioners' reliance on *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987), and *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 657 F.2d 814 (6th Cir.), cert. denied, 454 U.S. 1109 (1981), is misplaced. Those cases address the problems raised by a product (asbestos) that has negative health effects that manifest themselves only after a substantial time lapse; they have nothing to do with an attempt to recover "diminished resale value" damages for a product that safely performed its intended function. Likewise, *Lane v. Trenholm Building Co.*, 229 S.E.2d 728 (S.C. 1976), does not

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[1] Petitioners cite several decisions of state and federal trial courts and state intermediate appellate courts, but those cases do not address the issue of diminished resale value of a product sold to a consumer under UCC § 2-314. In any event, a conflict between such a decision and a decision of a federal court of appeals has never been a ground for review by this Court—particularly when the question presented turns on state law.

aid petitioners' case. *Lane* was an action to recover damages for the sale of a house with a malfunctioning septic tank, and it has nothing to do with recovery of "diminished resale" damages on a properly functioning product.

We do not mean to downplay the practical importance of the issue that petitioners raise. Acceptance of petitioners' novel theory that "diminished resale value" is a basis for an implied-warranty claim would be a matter of wide application to consumers and businesses alike. But the court below correctly rejected that theory, and a challenge to an obviously correct determination of an issue of state law is not a proper occasion for the exercise of this Court's discretionary review power.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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